SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 186

OHIO TANK CAR COMPANY,

Petitioner,

vs.

KEITH RAILWAY EQUIPMENT COMPANY

BRIEF IN SUPPORT OF PETITION

Opinions Below

The Memorandum-Opinion and the Finding of Facts and Conclusions of Law are not reported but are in the record at pages 39-42. The Opinion of the Circuit Court of Appeals is reported in 148 F. (2d) 4 and is in the record at pages 57-62.

Jurisdiction

The jurisdiction of this Court is involved under Section 240 of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. Sec. 347(a)).

Questions Presented

The questions here presented are stated in the Petition (*ante* p. 4).

Statutes

The statute involved is the Elkins Act (49 U. S. C. Sec. 41). The pertinent provisions thereof are set forth in the petition (*ante* p. 4).

Specification of Errors to Be Urged

There are indicated under the heading "Questions Presented" in the Petition (*ante* p. 4) and in the Subject-Index (*ante* p. i).

Summary of Argument

Corporations do not lose their identity merely because as is the case with petitioner and Akin Gasoline Company, they are owned by the same group of stockholders and have the same officers and joint offices, and the facts of record are insufficient to support the finding below that petitioner and Akin Gasoline Company were one and the same corporation for the purposes of the Elkins Act or for any other purpose. The authorities are clear that the mere fact that shareholders, managers and officers in corporations are identical and that stockholders of both are held by one or the other corporation or the same group of stockholders is not enough to warrant disregard of the corporate entity. The record facts prove that petitioner and Akin Gasoline Company were separate functioning entities and not one and the same.

The corporate entity is to be disregarded only under exceptional circumstances and there is no proof in the record that the relationship which existed between petitioner and Akin Gasoline Company was utilized to accomplish an illegal or unjust result, and, therefore, there is no reason to disregard the entity of either corporation.

The question in this case is not merely whether Akin Gasoline Company was a shipper, but whether it was a shipper within the meaning of the Elkins Act, and it was not. The cases show that the question as to whether or not a person

is a shipper within the meaning of the Elkins Act is not to be answered by applying the usual test. They make clear that a shipper within the meaning of the Elkins Act is one who could receive and does receive a rebate or concession so that, as to such shipper, the goods moved in interstate commerce at a rate less than that contained in the published tariffs. Akin Gasoline Company never paid any part of the freight bill on the shipments involved in this case and could not, therefore, receive a rebate.

The lease agreement between petitioner and respondent created not only a relationship of lessor and lessee but with respect to mileage allowance created a relationship of principal and agent; and the mileage allowance were received by respondent, not in its own right but as a collecting agent for petitioner.

General American Tank Car Corporation v. *El Dorado Terminal Company*, 308 U. S. 422, is the only case dealing directly with the question of payment by lessor tank car line to its lessee of mileage allowance collected from the carriers and the opinion in that case held that the lessor is the mere collecting agent of the lessee with respect to receiving mileage allowance from the carriers. The decision in the *El Dorado* case is controlling on the question of agency in the instant case and since the respondent was the collecting agent for the petitioner, respondent should have paid over to petitioner mileage allowance received by it from the carriers.

There was no violation of the Elkins Act because the situation herein is not covered by the Elkins Act. The section of the Elkins Act governing the facts in this case is the one containing provisions against the offering, granting, giving or soliciting any rebates, concessions or discriminations in respect to transportation of property in interstate commerce. The legislation was drawn as part of a scheme of regulation of carriers in interstate commerce and the Congressional purpose was to require that the published

tariffs of common carriers should be adhered to and not departed from either by means of rebates or concessions.

With the exception of *Union Pacific Railroad Company* v. *United States,* 313 U. S. 450, all cases holding that there has been a violation of the Elkins Act have been cases where the facts disclose that there has been an actual contribution by the carrier to the shipper, directly or indirectly, or an unlawful discrimination by the carrier in transportation services rendered.

The Elkins Act does not apply to the facts in this case; none of the parties was in a position to grant or receive a rebate and all of the elements of a rebate are missing. The matter was merely what it purported to be, i. e., a lease agreement between two tank car line companies and any payment by one to the other is merely the payment over of mileage allowance according to the terms of the agreement, and not a rebate.

The agreement on the part of the respondent to pay the mileage allowance to petitioner in no way represented an agreement to give a concession to petitioner as that term is used in the Elkins Act. The question whether or not the payments were concessions was never raised before the District Court nor the Circuit Court of Appeals and under well settled principles of law the Circuit Court of Appeals was without power to decide the case upon that basis.

I

ARGUMENT

Petitioner and Akin Gasoline Company are not one and the same, nor was the corporate form of Akin used to accomplish an illegal purpose.

In its first Conclusion of Law (R. 42) the District Court held that Akin Gasoline Company and petitioner are, for the purpose of the litigation, one and the same. The Circuit Court of Appeals held that the corporate form of Akin

had been used to accomplish something forbidden by the Elkins Act, stating:

> "Thus has been accomplished indirectly, by a mere corporate form, that which the Elkins Act seems to prohibit. For this reason we think the corporate form of Akin should be disregarded, and we hold that plaintiff and Akin were one and the same for the purpose of applying the Elkins Act." 148 F. (2d) 4, 7-8; R. 62.

We think it would have more clearly expressed what the Court had in mind if it had stated:

> "True, there is no proof here that the corporate relationship was utilized to accomplish an illegal purpose, but since the plaintiff-appellant was due under the agreement to receive a part of the mileage allowance, there must have been, for some reason not clear to us, an intent to violate the Elkins Act. Inasmuch as the close corporate relationship and the contractual right to receive a part of the mileage allowance can be regarded as suggestive of some sinister design, we, therefore, hold the agreement to have been illegal and violative of the Elkins Act."

We state that some such thought must have been in the mind of the Circuit Court because the proof in the case shows that the petitioner and Akin were two separate, functioning entities, and the court's reasoning concerning the Elkins Act we think, as shown later on in this brief, was unsound.

In reaching the conclusion that the corporations were one and the same both of the courts below overlooked or ignored the abundant proof of the fact that the two corporations are separate, functioning entities, each engaged in carrying out the purpose for which it was incorporated, all of which appears of record:

(a) The certified charter of the petitioner attached to the original complaint (R. 4-9).

(b) The agreement between the petitioner and respondent attached as an exhibit to the complaint (R. 9-13).

(c) The following facts contained in the stipulation:

1. Akin is a marketer of petroleum products (R. 24).

2. As such marketer of petroleum products Akin makes and performs contracts with refineries and customers; supplies refineries with forms of bills of lading; maintains a traffic department which routes the shipments made by the refineries; bills its customers for products sold and pays refineries for products purchased; collects from the refinery "outage," which is due to Akin's customer, and in turn pays such "outage" over to the customer (R. 24-25).

(d) The Ohio Tank Car Company is under the complete direction of its secretary who, as its general manager, carries on all the activities which are usual with tank car lines (R. 28).

(e) The Ohio Tank Car Company owns tank cars and has its own reporting marks; it leases these cars to various companies; it collects mileage earnings on these tank cars from carriers; it leases tank cars from other tank car lines (R. 29).

(f) The Akin Gasoline Company never leased any tank cars from any tank car company (R. 30).

(g) The Ohio Tank Car Company did not transfer any of its mileage earnings to Akin (R. 31).

Disregard of the corporate entity is to be resorted to only "in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights," *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 442. The exceptional situations do not

include those where the application of the rule destroys the enforcement of the private right and no public right is here involved. It is only by holding that the corporations are one and the same that a violation of the Elkins Act can be spelled out and if there has been any public right which has been shorn of protection or whose enforcement has been thwarted by the action of the parties involved, the record is barren of any mention of it. The disregard of the corporate entity in this case was error on the part of both of the lower courts, which coupled with their erroneous construction of the Elkins Act has worked a manifest injustice to the petitioner to the great and unwarranted advantage of the respondent.

II

Akin Gasoline Company Was Not a Shipper Within the Meaning of the Elkins Act

The District Court found that the tank cars which were furnished under the lease were used in interstate commerce by Akin as shipper (R. 41) and that payments of the mileage allowance by respondent to the petitioner were payments to Akin, the shipper, and therefore, rebates (R. 42). The Circuit Court of Appeals held that the payments were not rebates, but were concessions (148 F. (2d) 4, 7; R. 61). We contend they were neither.

Whenever any shipment has been made, which one of the parties to the transportation was the shipper can only be determined by reviewing the facts of the particular transaction. Usually in a shipping transaction the person who directs the shipment and selects the route over which it is to be made is generally considered to be the shipper. Other tests would make the shipper the person who pays or bears the freight bill.

The question in this case is not merely whether Akin was the shipper, but whether Akin was the shipper for the purposes of determining whether or not there was a violation of the Elkins Act. In order more fully to understand the question presented for decision it should be pointed out that the conclusion of law of the District Court on which it based its entry of judgment for the counterclaim was that petitioner by returning the mileage allowances would be returning rebates and would thus put the shipper (Akin) "on an equal basis with all other shippers and subject to the published rates." This the Circuit Court of Appeals approved by affirming the judgment.

The record discloses that Akin directed the refinery whose products were shipped in the tank cars to ship the product to Akin's customer; Akin's traffic manager routed the shipment and inserted the freight rate, and Akin furnished the bill of lading which was used (R. 24-25), but neither Akin nor the petitioner paid any part of the freight bill. This was paid by Akin's customer and the freight differential was paid by the refinery (R. 25). If because of the way in which it participated in the act of transportation Akin was a shipper, it was, nevertheless, not a shipper within the meaning of the Elkins Act.

In *United States* v. *Lehigh Valley Railroad Company*, 222 F. 685, a case dealing with a violation of the Elkins Act, it is stated (p. 686):

> "The relation of shipper and carrier is formal and must respond to certain well known tests. It has no relation to ownership."

Another case showing that the usual tests for determining which party is and which is not the shipper may have no application in determining whether or not a person is a shipper for the purposes of the Elkins Act is *United*

States v. *Metropolitan Lumber Company*, 254 F. 335. The opinion in that case discussed demurrers to indictments charging violations of the Elkins Act by persons who, just like the customers of Akin, were consignees and paid the freight. The Court said at page 346:

> "It is further urged that the indictments do not charge a crime, because the allegations thereof demonstrate that the defendants were not 'shippers' within the meaning of the Elkins Act. * * * It is true that the indictments set forth that the defendants were 'consignees' of the lumber which was transported in violation of the embargo; but they further allege that the respective defendants for the purpose of obtaining transportation, caused the property to be fraudulently consigned, etc. Thus it appears that the defendants were the actors in the illegal transactions; and, so far as the indictments show, they were the persons to be benefited by the discrimination or concessions. The question then is: Were they, under such circumstances 'shippers' within the meaning of the Act? I have no doubt that they were. To give the word 'shippers' the narrow meaning sought by defendants, and thus to hold that a consignee, when a different person than the consignor, could under no circumstances be a shipper, would, in many cases, defeat the main purpose of the Act. *For instance, very frequently the consignee, although he does not initiate the shipment, pays the freight, and the goods are in reality transported for him. Furthermore, in such cases he is the only person benefited by or interested in concessions or rebates. For obvious reasons, unless the very purpose of the Act is to be nullified, such a consignee is a shipper, within the meaning of the Act as he is in fact.*" (Emphasis supplied.)

Under another point the purpose of the Elkins Act is fully discussed with citations of authority, and it is obvious from those authorities that a shipper for the pur-

poses of the Elkins Act is one who is benefited by receiving rebates or concessions so that he obtains the transportation of property at a price less than the published freight rate. This benefit to him comes by receiving either a rebate or a concession, but it is so plain as to need no argument to demonstrate the correctness of the proposition, that one who does not pay and is in no way liable for the payment of the freight bill irrespective of how much he may be paid in mileage allowance will not be receiving a rebate or a concession, so that property insofar as he is concerned is transported at less than the published rate. And it is transportation "at a less rate in dollars and cents than the published rate which the shipping public are charged," *United States* v. *Michigan Portland Cement Company*, 270 U. S. 521, 524, which constitutes a rebate.

In this case irrespective of the fact that Akin directed the shipment of the petroleum products in the tank cars issued on their own bills of lading and routed the cars, it, nevertheless, never paid any part of the freight bill nor did the petitioner. It is obvious, therefore, that notwithstanding the close corporate relationship between petitioner and Akin and even conceding *arguendo* that payment of the mileage allowance to petitioner was payment to Akin, nevertheless, payments of the allowance were not rebates or concessions; they were merely payments of money due by reason of contractual arrangements between petitioner and respondent.

They were, in short, as is shown below under Point III, payments by a collecting agent to a principal of amounts collected for the principal.

III

The lease agreement between petitioner and respondent created not only a relationship of lessor and lessee but with respect to mileage allowance created a relationship of principal and agent; and the mileage allowance was received by respondent, not in its own right but as collecting agent for petitioner.

The only case we have found which deals directly with the division of mileage allowance earned by tank cars is the case of *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. That case differs from this case in that there the shipper rented the cars from the tank car line; here both lessor and lessee are tank car lines. However, since it is more nearly similar to the present case than any other decided under the Elkins Act, it deserves careful attention. El Dorado Terminal Co. had sued as assignee of its parent, the El Dorado Oil Works, to recover from the tank car company certain mileage allowance allegedly due. The El Dorado Oil Works had entered into a lease similar to the one which was executed by the parties in this case, and like the lease in this case, it provided that the mileage allowance should be paid to the lessee. The tank car corporation observed the terms of the lease and paid to the El Dorado Oil Works the mileage allowance which was its due under the lease until 1934.

The Interstate Commerce Commission in 1934 issued its report and order in a case entitled "*Allowances for Privately Owned Refrigerator Cars,*" 201 I. C. C. 323, and in view of certain statements made by the Commission in that report, the General American Tank Car Corporation professed to fear that further observance of that part of the agreement

providing for the division of mileage allowance would result in a violation of the Elkins Act. Accordingly, it refused to pay over to the El Dorado Oil Works any further sums which had been earned as mileage allowance.

The El Dorado Oil Works assigned its claim to these unpaid mileage allowances to the Terminal Co. which sued the General American Tank Car Corporation for the unpaid amounts. The District Court dismissed the complaint, the Circuit Court of Appeals reversed and this Court granted certiorari. By its decision this Court held:

(a) Where a suit is brought by a shipper-lessee against a tank car company for mileage allowance earned by cars leased to the shipper by the tank car company, a federal district court has jurisdiction of the cause. If, however, there has been no tariff filed covering the situation, nor any determination made by the Interstate Commerce Commission concerning the lawfulness and reasonableness of the practices involved, the court should stay further proceedings until an administrative ruling had been made by the Commission. Said the Court by Mr. Justice Roberts:

> "The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibition of the Elkins Act are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts, only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders.
>
> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." 308 U. S. 432-433.

(b) Where a shipper leases cars from a tank car company and leased cars are then used by carriers in interstate

commerce, it is the shipper—not the tank car company—which furnishes the cars to the carriers and is the only one entitled to receive the mileage allowance or earnings. At 308 U. S. 431 this Court stated:

> "The Circuit Court of Appeals has held, and we think correctly, that the shipper—the Oil Works—furnished the cars to the carrier in the present instance. The petitioner (Tank Car Company) did not. The shipper was then entitled, under the plain terms of Sec. 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility. It seems clear that no rule or regulations of the carrier may provide for the payment of such allowance to any other person." 308 U. S. 431.

(c) Where a shipper leases tank cars from a tank car company under a lease providing that the tank car company shall collect the mileage earnings on the leased cars and credit them to the account of the shipper-lessee, that the tank car company becomes the collecting agent of the shipper-lessee. The Court said:

> "And we think the consideration, that, in this case, the petitioner (tank car company) acted merely as collecting agent for the shipper does not take the case out of the Commission's jurisdiction." 308 U. S. 431.

This Court refused to decide the precise issue in that case which was whether or not the tank car company owed the Terminal Company the amounts which had been sued for. It refused to do so because it thought in doing so it would have to decide upon the lawfulness of the practice involved which was a matter for the jurisdiction of the Interstate Commerce Commission. No other conclusion is possible from the statement on pages 431 and 432 of the decision that:

> "If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substan-

tial profits on leased cars by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that in the case of refrigerator cars, held under similar leases, this has been the case. The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission."

The decision in the *El Dorado* case on the question of agency is controlling in this case because the relationship created by the leases in both cases is identical and if the lessor was a collecting agent in the *El Dorado* case, it is one in this case also.

The lease between the petitioner and the respondent containing as it did, provisions for the collection by the lessor of the mileage earnings and the division of mileage allowances, (R. 10) made the petitioner the collecting agent for the respondent, and, under elementary principles, as such agent it had no choice but to pay over the amount so collected.

The questions which this Court did not decide in the *El Dorado* case are not present in this case as the lease was one between two tank car lines and not between a shipper and a tank car line. The tariffs on file with the Interstate Commerce Commission would have no bearing on the amount of the mileage to be paid by the carriers in this case as that would be governed by the provisions of the Railway Equipment Register (Plf's. Exhibit 2) as the payments were made by the carriers to a tank car line.

It is idle, therefore, for the District Court whose decision was approved by the Circuit Court of Appeals, to speak of using the judgment for the counterclaim to compel petitioner to return rebates "in order to be put on an equal basis with all other shippers and subject to the published

rates" (R. 42). None of the mileage allowance in question was ever paid to anyone under tariffs on file with the Interstate Commerce Commission; there is no published rate governing this transaction and the entry of judgments for counterclaims will never bring the shipments in question under the tariffs nor will it correct an inequality which has never existed.

IV

There Was No Violation of the Elkins Act Because the Situation Herein Is Not Reached by the Elkins Act.

A. The Provisions of the Elkins Act.

The provisions of the first section of the Elkins Act may be summarized as follows:

Section 1 (1) of the Elkins Act (Title 49, U. S. C. A. Section 41 (1) contains prohibitions and prescribes penalties as follows:

> (1) The willful failure of a carrier subject to the Act to file, publish and strictly observe tariffs, rates and charges, shall be a misdemeanor.
>
> (2) It shall be unlawful for any person or corporation to offer, grant, give or solicit any rebate, concessions or discrimination in respect to the transportation of property in interstate commerce by any common carrier subject to the Act.
>
> (3) Any person or corporation, whether carrier or shipper, who shall knowingly offer, grant, give, solicit, accept or receive any such rebate or discriminations with respect to the transportation of property in interstate or foreign commerce by a carrier, shall be deemed guilty of a misdemeanor.

B. What the Elkins Act Was Intended to Accomplish

The Congressional purpose in enacting the Elkins Act was to require that the published tariffs of common carriers should be strictly adhered to and such purpose of Congress

in enacting the Elkins Act was outlined by this Court in *Armour Packing Company* v. *United States,* 209 U. S. 56, where it said at page 72:

> "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purposes of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

C. The Cases Showing Whereby There Is a Violation of the Elkins Act

In every case where it has been held that the Interstate Commerce Act or the Elkins Act has been violated with the exception of *Union Pacific Railroad Company* v. *United States,* 313 U. S. 450, there has been an actual contribution by the carrier to the shipper, directly or indirectly, or an unlawful discrimination by the carrier in transportation services rendered (In the *Union Pacific* case there was a concession by the city of Kansas City, Kansas, which this Court thought would result in certain shippers securing transportation at a less cost than that paid by shippers to whom the city did not give the concessions). Only in one or the other of these situations can the result prohibited by the statutes occur. This will be shown by a consideration of the following cases:

In *Central of Georgia Ry. Co.* v. *Blount,* 238 Fed. 292 (C. C. A. 5), the Court held the law violated where a carrier leased its own land to a shipper at no rental charge, upon the obligation by the tenant to ship over the railroad's

lines. Thus there was a return by the carrier to the shipper of part of the published rate.

In *Northern Central Ry. Co.* v. *United States*, 241 Fed. 25 (C. C. A. 2), the forbidden result was accomplished by a railroad company leasing coal land to a mining company on a royalty basis, and then making no bona fide effort to collect the royalty.

Vandalia R. Co. v. *United States*, 226 Fed. 713 (C. C. A. 7), held that where a loan of money by a carrier to a shipper at a rate of interest less than the carrier paid on money borrowed by it, upon the shipper's agreement to ship exclusively over the carrier's lines the act was violated.

Armour Packing Co. v. *United States*, 209 U. S. 56, involved a situation where the Burlington transported freight for the packing company, charging it an agreed rate but absorbing trans-Atlantic steamship rates with the result that the carrier received less than its published tariff.

In *United States* v. *Miller*, 18 Fed. Supp. 389 (D. C. D. Neb.) the defendant was convicted of making false statements as to the weights of shipments whereby persons other than the shipper obtained the difference between the freight charges paid by the shipper on the true weight and the lesser amount received by the carrier on the false weight. This resulted in the carrier not receiving its full tariff rate and produced the prohibited result of causing the carrier to transport property at less than its published tariff rate and therefore a violation of the Elkins Act.

In *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849 (C. C. A. 6), it was held a violation of the Act for a carrier to lease land to a shipper at a nominal rental in part consideration of the lessee's promise to give all inbound and outbound freight business to the carrier.

In *Grand Rapids & I. Ry. Co.* v. *United States*, 212 Fed. 577 (C. C. A. 6), it was held unlawful for a carrier to apply existing transit rates to shipments not entitled to transit

privileges and therefore subject to the higher local rates. The carrier here directly refunded to the shipper a part of the local rate.

In *Spencer Kellogg & Sons* v. *United States*, 20 F. (2d) 459 (C. C. A. 2), often cited to show that persons other than carriers and shippers can violate the Act, the owner of a grain elevator received one cent a bushel from a carrier for elevating grain transported by it. The payment to the elevator company was shown in the published tariff, and the one cent paid to the elevator owner was a part of the legal published rate. The elevator company refunded to shippers one-half cent per bushel from the tariff rates who were thereby enabled to transport grain at less than the published tariffs; the rebate was received from a person who furnished part of the transportation service and, therefore, was in the position of a carrier.

In *Elwood Grain Co.* v. *St. Joseph & G. I. Ry. Co.*, 202 Fed. 845 (C. C. A. 8), the carrier induced another to construct an elevator on its line and agreed to pay it $1.75 per car on all grain received on its line and passing through the elevator, but did not grant such payments to the owners of other elevators. It was held that this act of the carrier constituted a violation of the law in that the payments made by the carrier constituted a reduction *pro tanto* of the carrier's published rates.

Thomas v. *United States*, 156 Fed. 897 (C. C. A. 8), was a criminal proceeding charging the defendants with violation of Section 1 of the Elkins Act by getting receivers of freight to accept and receive rebates from the published rates of various railroads for the shipment of goods from New York to Kansas City. The Court held that two of the defendants, who were not shippers, but who had induced others to receive the rebate thus accomplishing the unlawful result, had violated the statute.

United States v. *Koenig Coal Co.*, 270 U. S. 512, involved an indictment charging a shipper with obtaining a preference in securing cars for the transportation of coal during an emergency congestion of traffic, by falsely representing that the coal was for the use of a hospital entitled to a priority under an order of the Interstate Commerce Commission. That the concession and discrimination was in that case practiced by the carrier is made clear in the opinion of the Court at page 519:

> "It is asked, if this was a concession, by whom was it conceded? The answer is by the carrier. He granted the priority and therefore he made the concession and gave the advantage and practiced the discrimination."

In every case in which a carrier has been held guilty of transporting property at less than its published tariff rates or committing an unlawful discrimination, the carrier itself has:

(1) Failed to collect its lawfully applicable published rate.

(2) Performed for favored shippers a transportation service denied to others paying the same tariff charge.

(3) Returned to a shipper a part of the published tariff rate paid by it or has accomplished that return indirectly through:

(a) Furnishing the shipper with use of property owned by the carrier.

(b) The use of money loaned by the carrier.

(c) Performance of non-carrier services each at less than the cost thereof to the carrier.

In every case in which one not a common carrier has been held guilty of violating the Elkins Act, the prohibited result

has been accomplished, with or without the knowledge of the carrier:

(1) By the return to the shipper, through one performing a part of the transportation service covered by the carrier's published tariffs, of part of the carrier's published rate.

(2) Through inducing the carrier to perform a service for a shipper, covered by its published tariffs, at a rate less than the rate therein provided.

(3) By inducing a carrier to perform a transportation service for one shipper to which it is not entitled under the carrier's published tariff and which, accordingly, the carrier does not perform for others.

In every case in which one not a common carrier has been held guilty of causing a common carrier to transport property at less than its published tariff rates or causing a common carrier to commit any discrimination prohibited by law, the third person has been in a position to and has accomplished that prohibited result.

The foregoing, we submit, shows clearly that the Elkins Act has no application to the transactions which are set forth in the record in this case. The case by the pleadings, the Memorandum Opinion (R. 39-44) and the Findings of Fact and Conclusions of Law (R. 41-42) involved only a question of rebates and those cases dealing with concessions are therefore not pertinent and the question of concessions should never have been considered by the Circuit Court of Appeals; certainly it should never have been made the basis of its decision.

But a rebate requires the carrier to play a part, the crucial part of returning to the shipper a part of the freight rate which he has paid. In *Standard Oil Company* v. *United States,* 164 F. 376 (cert. denied 212 U. S. 579), it was held that in a rebate the shipper pays in the first instance the

full rate to the carrier and afterwards receives back a part; the offense is not completed until he has taken back a part of the freight money, whereby his property has been transported at less than the lawful rate.

It would have been impossible for respondent to have paid either petitioner or Akin a rebate because

(a) Respondent is not a carrier and has no tariff on file.

(b) Respondent did not transport any product of the petitioner or Akin.

(c) Neither petitioner nor Akin paid respondent any freight rates.

(d) Respondent did not agree to nor did it refund freight rates either to petitioner or Akin.

In short, all the elements, not some, ALL, of a rebate are missing.

A great deal more has to be read into the Elkins Act than is contained in its words as enacted to bring the dealing of petitioner and respondent within its scope. The Elkins Act has not been violated by either of the parties to this litigation, because irrespective of intent, neither was able to violate and neither attempted to violate the Act.

D. The Agreement between Petitioner and Respondent Made no Provision for a Concession to Be Granted to Petitioner by Respondent nor Was the Receipt of the Mileage Allowance by Petitioner the Receipt of a Concession.

The basic error underlying the decision of the Circuit Court of Appeals is found in the following paragraph of the decision (148 F. (2d) 4 at page 7, R. 61):

> "Under the facts here presented we think Akin was the shipper, regardless of the fact that it paid no part of the freight. In United States v. Chicago Heights

> Trucking Co., 310 U. S. 344, the Court said: 'A special allowance to a forwarder as an inducement to ship goods by a particular carrier would be an illegal rebate. Similarly, * * * forwarders are shippers protected in the Interstate Commerce Act from discrimination by carriers.' Likewise we think a special allowance by the carrier to Akin, directly or indirectly, must be considered as an inducement to Akin to ship its goods by a particular carrier, and this is true regardless of who pays the freight. Such special allowance to Akin, if made, might not be considered a rebate in the strict sense of the word, but it certainly should be considered as a concession or discrimination in favor of Akin which others of its competitors did not enjoy. Such concession seems to be one of the many things which the Elkins Act intended to prohibit. We think the very clear and unambiguous language of the Act accomplished that intention. The Supreme Court has so construed it in United States v. Chicago Heights Trucking Co., supra. See also General American Tank Car Corporation v. El Dorado Terminal Co., 308 U. S. 422; Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323."

At the beginning of this paragraph the court relies on *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, as an authority having any bearing on this case. The decision in that case is confined solely to questions arising under Section 216(d) of Part II of the Interstate Commerce Act (49 U. S. C. Section 316(d)). The "special allowance" referred to by the court in the *Chicago Heights Trucking Company* case is entirely different from a mileage allowance paid by the carriers for the use of privately owned cars. Yet the Circuit Court of Appeals has mistakenly considered the two allowances as the same thing and refers to the mileage allowance which respondent contracted to pay to the petitioner as "a special allowance by the carrier to Akin * * * as an inducement to Akin to ship its goods by a particular carrier * * *." We submit that this

shows a complete lack of understanding on the part of the court of the issues involved in this case. There is no question here of any carrier paying any allowance or making any inducement to a shipper in order to increase its revenues or to obtain the shipment of freight over its lines. There is not one word in the record to show over which carrier's tracks the shipments moved nor at what rates and the payment by respondent to petitioner of the mileage allowance which it had contracted to pay could in no sense be a "special allowance" made by any carrier to petitioner.

The court then proceeds from this to another error by saying that the mileage allowance, which the court refers to as "special allowance," while not a rebate should be considered as a concession or discrimination in favor of Akin, and this the court says is something which "others of its competitors did not enjoy." The reasoning is fallacious. It assumes that petitioner was to receive the mileage allowance as a gratuity from respondent. It overlooks the fact that the right to receive a share of the mileage allowance was bargained for and obtained on the part of petitioner by entering into a contract binding petitioner to pay a stated rental for the use of 100 tank cars irrespective of whether or not those tank cars earned sufficient mileage allowance to cover the rental which petitioner contracted to pay. There is no element here of a concession. There was bargaining at arm's length and a definite *quid pro quo* and the fact that the agreement turned out to be profitable for petitioner should not be permitted to obscure this fact. If the agreement resulted in placing the petitioner in a position more favorable than that occupied by its competitors, the result was obtained solely by reason of the agreement which created distinct liabilities on the part of the petitioner. However, there is nothing in the record to show that petitioner's competitors were not as favorably situated

as it, and there is no reason to believe that those competitors did not have similar agreements with other tank car companies or that they could have had such agreements with tank car companies if they desired to take the risk. If a court is to speculate upon the matter, as the Circuit Court of Appeals did, it would probably be nearer the realities if it took into consideration the fact that petitioner was not the only company in the United States which made agreements with tank car companies. Since the opportunity to make similar agreements is open to all of petitioner's competitors, it is erroneous to say that because of petitioner's agreement it occupied a position which was superior to that of its competitors merely because it was entitled to receive a part of the mileage allowance.

V

The Circuit Court of Appeals Was Without Power to Pass Upon the Question of Whether Payment of the Mileage Allowance Was a Concession.

The case was tried in the District Court on the issue of whether or not the agreement that petitioner should receive a part of the mileage allowance was an agreement for the payments of rebates. It was the sole question presented. The District Court held that the agreement was one providing for the payment of rebates. The question on the appeal was one of rebates. The Circuit Court of Appeals held that the payment of the mileage allowance by respondent to petitioner was not a rebate, which was a plain overruling of the decision of the District Court. The Circuit Court of Appeals then went on gratuitously to hold that the payment was a concession and affirmed the judgment.

This, we submit, the Circuit Court was without authority to do. It is established by many rulings of this Court that review by an appellate court is restricted not only to the

judgment appealed from, but also to such questions and issues as were made and considered below and decided by the lower court. *Hormel* v. *Helvering*, 312 U. S. 552; *United States* v. *Northern Pacific RR. Co.*, 311 U. S. 317; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456.

Upon the record and issues before it the Circuit Court of Appeals was restricted to determining whether or not rebates were provided for and upon determining that question adversely should have reversed the judgment of the District Court. It lacked power to do more and, therefore, its judgment should be reversed.

Conclusion

The judgments of the District Court and the Circuit Court of Appeals are clearly erroneous; the petition for certiorari should be granted and after argument this Court should enter judgment reversing the decisions of the lower courts.

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June 30, 1945.

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